

# CWA § 404(g): State and Tribal Dredged and Fill Permit Program Regulatory Revision

## **2018 Tribal Consultation Webinar**

November 29, 2018

Final

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# Agenda

- 2:00 Welcome and Introductory remarks – Benita Best-Wong, Acting Deputy Assistant Administrator for Office of Water, John Goodin, Acting Director, Office of Wetlands, Oceans and Watersheds (OWOW)
- 2:05 Agenda - Kathy Hurl, OWOW
- 2:10 Presentation on CWA 404(g) Program and Proposed Rulemaking Revision, Kathy Hurl, OWOW
  - Background
  - Revising CWA 404(g) Regulations
  - Issues for Input
- 2:40 Q&A - *Tribal Participants (Moderators: John Goodin and Kathy Hurl, OWOW)*
  - Potential issues for input:
    - Scope of assumable waters
    - Partial assumption
    - Costs and additional challenges
    - Other issue: Mitigation, Self-issuance of permits, Consistency with permit requirements, Enforcement and Compliance
  - Other questions or issues
- 3:45 Next Steps – John Goodin, Acting Director, OWOW
- 4:00 Adjourn

# Why Are We Here?

- Provide information on Clean Water Act Section 404 Program (CWA §404(g))
  - What is assumption?
- EPA is supporting tribes and states that wish to assume CWA §404(g) permit program
  - Acting Administrator Wheeler letter – September 20, 2018
- EPA is updating the CWA §404(g) regulations
  - Seeking input on how regulations could be updated and modernized to increase interest in CWA §404(g)
  - Fall Regulatory Agenda – Propose Rule 2020

# What Is CWA §404(g) Program Assumption?

- **CWA §404 requires a permit be issued before dredged or fill material can be discharged into waters of the US**
- CWA § 404(g) enables tribes and states to assume administration of the program for certain waters
  - Michigan (1984) & New Jersey (1994) have assumed this authority
  - Army Corps of Engineers (Corps) issues permits for all other jurisdictional waters
  - EPA oversees assumed programs



# What are the Authorities For State/Tribal CWA §404(g) Programs ?

- CWA §404(g) and 40 CFR Part 233 describe:
  - State and tribal program requirements
  - EPA responsibilities: approval and oversight of assumed program
  - Requirements for review, modification, and (if necessary) withdrawal of assumed program
- State/tribal programs are not delegated, they operate under state/tribal statutes.
  - A tribal or state assumed program must be consistent with and no less stringent than the CWA and regulations.

# Why Assume the CWA § 404 Program?

## **States and tribes have said:**

- Streamline permitting – reduce permitting timeframes and facilitate coordination with other tribal and state water and land use programs
- Eliminate unnecessary duplication
- We have more intimate knowledge of our water resources and needs
- Be consistent with other CWA programs implemented by tribes and states

## **What challenges have states and tribes identified?**

- Lack of dedicated funding
- Lack of clarity on assumption process and requirements including which waters are assumable

# What Are the Assumption Requirements?

Assumed program must include, but is not limited to:

- Permitting procedures;
- Administrative and judicial review procedures;
- Regulation of discharges into all assumed waters within the tribe or state's jurisdiction;
- Regulation of at least the same scope of activities as the CWA § 404 program;
- Provisions for public participation;
- Meeting public notice requirements;
- Permit issuance consistent with the environmental review criteria known as the CWA §404 (b)(1) Guidelines;
- Compliance and enforcement authorities as specified in the regulations; and
- Coordination procedures with federal agencies, adjacent states and tribes.

# What Is EPA's Role in Assumption?

## **Prior to assumption:**

- Work with tribes and states to enhance capacity/capability and develop programs
- Wetland Program Development Grants can fund capacity building
- CWA §106 can fund program implementation

## **Evaluate and approve/disapprove assumption request:**

- Includes tribal consultation if appropriate

## **Oversight of assumed program:**

- Review and comment on permits (if not waived)
- Review modifications to assumed program
- Withdraw program approval (if necessary)

# Roles of Tribes/States Under Assumed Programs

- Issue permits
  - Process permit consistent with state/tribal approved program
  - Tribe/state transmits to EPA notice of every permit application received
  - Address comments from downstream states and tribes
  - Address any EPA conditions and/or comments on permits reviewed
  - State or tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- Conduct enforcement (if authorized)

# EPA Is Revising CWA §404(g) Regulations

- First comprehensive revision to the existing CWA §404(g) regulations since 1988
- EPA is seeking early input from our co-regulators on potential changes
- Pre-Proposal engagement:
  - Tribal consultation and coordination
    - Comment period October 22 - December 21, 2018
    - Presentation to National Congress of American Indians - October 24, 2018, Denver, CO
    - Tribal webinars held on November 20 and 29, 2018
  - State input
    - Comment period November 12, 2018 – January 11, 2019
    - Meeting December 5, 2018, Washington, DC

## Issues for Input

- Clarifying Scope of Assumable Waters
- Partial Assumption
- Calculating Economic Costs and Benefits of the Rule
- Other Potential Issues

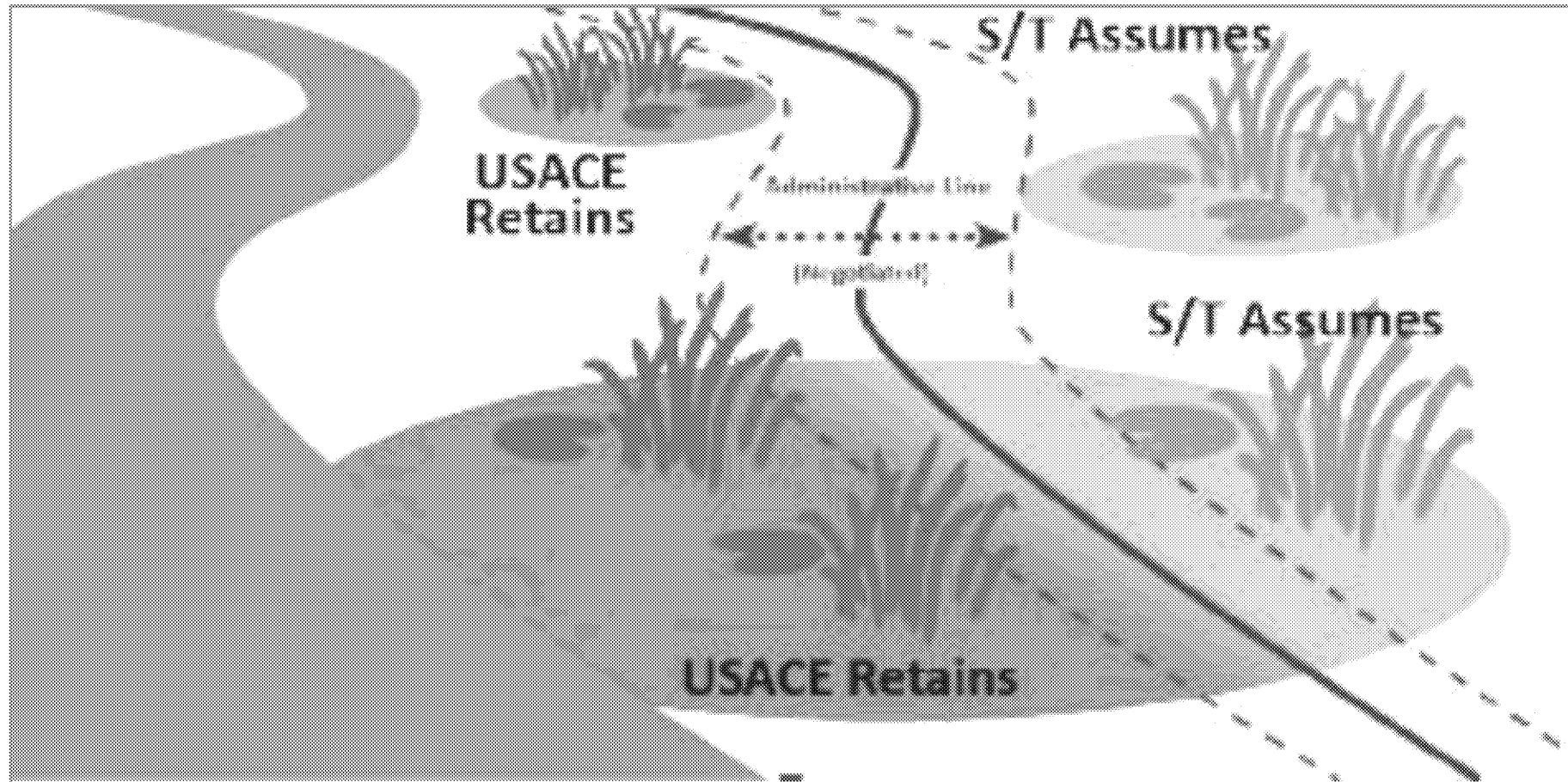
# Issue #1: Clarifying Scope of Assumable Waters

## Background:

- States and tribes can assume administration of the CWA §404 program only in certain waters. The Corps retains permitting authority for:
  - Tidal waters and their adjacent wetlands
  - Waters used as a means to transport interstate or foreign commerce and their adjacent wetlands
- Retained waters further clarified in recent US Army memo:
  - August 7, 2018, memo describes which waters are to be retained by Corps when state or tribe assumes waters
  - Based upon 2017 recommendations from EPA federal advisory committee on assumable waters (<https://www.epa.gov/cwa-404/assumable-waters-sub-committee>)



# Retained vs Assumed Adjacent Wetlands Graphic: of FACA Recommendation 3C



# Issue #1: Clarifying Scope of Assumable Waters

## Questions:

- The scope of assumable and retained waters:
  - Should the EPA codify the Subcommittee majority's recommendation that the Corps retained waters be based on § 10 waters of the Rivers and Harbors Act?
  - If yes, how should post-assumption changes to the Corps' § 10 list be treated? What process should be used to make any potential changes to the retained waters list?
- Which adjacent wetlands should be retained:
  - Should the EPA codify the Subcommittee majority's "default" 300 foot administrative line - Corps retains wetlands waterward of the line. If so, why?
  - Should a different "default" value be considered? If so, why?
  - Should there be no default distance in light of differing wetlands characteristics among different eco-regions? If so, why?
- Who (tribe/state or Corps) should have administrative permitting authority over discharges that extend across the administrative line?

# Issue #2: Partial Assumption

**Background:** States and tribes have requested the ability to assume part of the program, which is currently not an option.

## Questions:

- Would partial assumption be of interest to your tribe?
  - Would your tribe be more likely to assume 404 authority?
  - What are the benefits to partial assumption?
  - What are the challenges to partial assumption?
  - Should the approach allow more than one state/tribal entity to take on different portions of the 404 program? In a phased approach?
- How would you suggest partial assumption be structured?
  - By activity? By discharge impact threshold? By geographic distribution?
  - How will a permittee know to whom they should submit a permit application?
- How is this different than a State Programmatic General Permit (SPGP)?
  - If you have experience with an SPGP, and are considering partial assumption, what additional flexibility would partial assumption provide that an SPGP does not?

# Issue #3: Calculating Economic Costs and Benefits of the Rule

**Background:** EPA will conduct an economic analysis as part of the rulemaking

## **Questions:**

- What are the anticipated costs and benefits to states/tribes and federal agencies (e.g., staffing, administrative costs)?
  - Cost and benefits of full and partial assumption.
- Are there other limitations and barriers (e.g., interagency coordination, expertise)?
- Are there elements of program assumption that EPA could clarify are eligible for support under existing authorities?

# #4 Other Potential Issues

## **Self-issuance of permits:**

- What practices should be followed when it becomes necessary for the tribe or state to issue a permit to itself?

## **Mitigation:**

- Should establishment and composition of mitigation interagency review teams (IRTs) differ under assumed programs? If so, how?
- How might existing mitigation banks containing assumed waters continue operation following assumption?

## **Consistency with permit requirements**

- How can states and tribes best ensure permits comply with the (b)(1) guidelines?
- How can tribes and states address threatened and endangered species or national historic sites?

## **Enforcement and Compliance**

- Do the current regulations impose any barriers to assumption that EPA could consider addressing?
- Should EPA consider changes that would help in abating violations of permits or the permit program?



# Questions?

## Next Steps on CWA §404(g) Regulation Revision

- **Tribes can submit pre-proposal comments:**
  - Comments can be submitted by **December 21, 2018** to: [404g-rulemaking@epa.gov](mailto:404g-rulemaking@epa.gov)
- **EPA will review input and craft proposed regulatory language**
  - Will engage other agencies during OMB review
  - Will likely host another webinar prior to publishing proposal
- **How to submit public comments:**
  - EPA will open a public comment period when the Agency publishes the proposed rule in the Federal Register in 2020

## Additional Information

EPA 404 assumption website:  
<https://www.epa.gov/cwa404g>

Email and pre-rule consultation  
comments:  
[404g-rulemaking@epa.gov](mailto:404g-rulemaking@epa.gov)



# Contact Information

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Thank you